Supreme Court of the United States

OCTOBER TERM, 1903.

No. 277.

NORTHERN SECURITIES COMPANY AND OTHERS,

Defendants,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT NORTHERN PACIFIC RAILWAY COMPANY.

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Brief for Appellant Northern Pacific Railway Company.

On July 2, 1890, Congress passed an act, section 1 of which says :

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

Section 2 says :

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

In this suit the United States relying solely on said statute seeks to enjoin the Northern Securities

Company from owning and voting the stocks of the Northern Pacific and Great Northern Railway Companies, which are corporations, one chartered by Wisconsin, one by Minnesota, engaged partly in interstate commerce. A portion of their interstate traffic is competitive. The United States asserts, that the statute makes it unlawful for one corporation to acquire and own the stocks of two competing interstate railways, or at least that such holding is unlawful by a corporation, *the promoters of which organized it with the intent that it should acquire such stocks.*

It is the purpose of this brief to meet the contention of the United States assuming that the facts found by the Circuit Court are all true. To other briefs is left discussion of the facts.

I.

The language of the statute is remarkable for its generality. It denounces every contract, combination and conspiracy *in restraint of trade or commerce* among the States. Not every contract, combination or conspiracy is declared illegal, but only those *in restraint of trade.* The learned Attorney General cannot rest, therefore, on proof of combination or conspiracy, he must establish *restraint of commerce.* To do this he must prove that for one person or corporation to own the stocks of two competing carriers *is per se* a restraint of commerce.

The act does not define what is restraint of commerce. Notwithstanding, as the record shows,

extensive railway consolidation and merger had been going on for years before 1890, and this had been reported to Congress by the Interstate Commerce Commission, and had been publicly discussed in the press and elsewhere; notwithstanding Congress and the people were perfectly familiar with all this, there cannot be found either in the debates of Congress or in the press of the country, or in any public discussion contemporaneous with the act the slightest mention of railway mergers, or consolidations, or the qualifications of stockholders in parallel lines as among the things intended to be regulated by the statute. Considering this, and that the act introduces no new definition of restraints of trade, and that it is purely a penal statute, it is at the outset rather startling to be told that its very general language makes criminal, and therefore unlawful, combinations to consolidate two interstate railways, or to gather together in one hand the control of their stocks.

II.

The statute must be interpreted so as to fall within the Constitutional powers of Congress. Construed as the Circuit Court read it, or as the learned Attorney General asks to have it read, the act seems to us far beyond the scope of those powers. It is nothing less than an overturning of all settled rules upon the subject to say that the power of Congress extends to determining in what corporations stock may be held by citizens of the States; or that it extends to the regulation of the consolidation and merger of railway companies chartered by the States.

To the States belongs the power to regulate, and restrict as far as they may think advisable, the rights of their citizens and their corporations to own property. To Congress belongs the power to regulate the *use* of such property in commerce between the States.

The power of Congress has never been more accurately or completely described, than by Chief Justice MARSHALL in *Gibbons vs. Ogden*, 9 Wheat., 1 (189–190):

> "Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, *and is regulated by prescribing rules for carrying on that intercourse.*"

This definition has been frequently repeated by the Court; *The Passenger Cases*, 7 How., 283, 394, 462; *Henderson vs. Mayor*, 92 U. S., 259, 270; *Champion vs. Ames*, 188 U. S., 321, 346.

Commerce consists of intercourse, and the power of Congress to regulate consists in "prescribing rules for carrying on that intercourse," By no straining of language, or perversion of thought, can the rules by which property in the States is to be bought, held or sold be said to be among the *rules for carrying on intercourse* among the States.

Congress may pass an interstate commerce law, it may fix rates, regulate traffic and the ways and vehicles of traffic, but unless the States are to be shorn of many of the most important powers they have heretofore exercised, and been universally understood to possess, Congress cannot regulate the mere owning of property within the States, or the intents, aims and purposes with which it is acquired.

All the power of Congress is conferred by Section 8, Article I., of the Constitution :

> "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

And by the Tenth amendment all power not thus granted is reserved to the States.

We concede the full, absolute and supreme character of the power of Congress to regulate commerce. Within its sphere that power acknowledges no limitations other than those prescribed in the Constitution. But the power of Congress is only to *regulate*, and is, to use another phrase of Chief Justice MARSHALL in *Gibbons vs. Ogden* (p. 196), the power "*to prescribe the rule by which commerce is to be governed.*"

Congress has not the constitutional power, under the guise of regulating commerce, to prescribe the general rules by or under which either real estate, or personal property, stocks or bonds, may be bought, owned, sold, passed by descent, or willed within the States. Congress cannot regulate the manufacture of articles in a State, though they may be intended ultimately for shipment to another State. Much less can Congress say that I may not buy property within a State because I may intend to use it in a business carried on with the intent to monopolize or restrict interstate commerce. No more can Congress restrict the right of partnerships, or corporations organized by virtue of State laws to buy within the States, either real or personal property, including stocks and bonds.

Mr. Justice JACKSON, then Circuit Judge, said, *In re Greene*, 52 Fed., 104, 112 :

"But Congress certainly has not the power or authority under the commerce clause, or any other provision of the constitution, to limit and restrict the right of corporations created by the States, or the citizens of the States, in the acquisition, control and disposition of property. Neither can Congress regulate or prescribe the price or prices at which such property, or the products thereof, shall be sold by the owner or owners, whether corporations or individuals. It is equally clear that Congress has no jurisdiction over, and cannot make criminal, the aims, purposes and intentions of persons in the acquisition and control of property, which the states of their residence or creation sanction and permit. It is not material that such property, or the products thereof, may become the subject of trade or commerce among the several states or with foreign nations. Commerce among the states, within the exclusive regulating power of congress, 'consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities.' *County of Mobile v. Kimball*, 102 U. S., 691–702; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S.. 203."

The case of *United States vs. E. C. Knight Company*, 156 U. S., 1, involved the question whether the power of Congress over commerce and the Trust Law of 1890 extended to making unlawful a combination of corporations and individuals engaged in manufacturing and selling sugar. The Court held that the act did not extend to prohibit a combination of sugar refineries within a state accomplished by transfer of stock in corporations, although the intention might be to export the manufactured sugar, or some part thereof, to other states. The case settles that the act cannot be

held to prohibit such a combination, whether of individuals or corporations, from owning the real estate or machinery, or the stocks and securities, necessary to form such a combination of factories. The Court said (p. 16) :

> "It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such ; or to limit and restrict the rights of corporations created by the states or the citizens of the states in the acquisition, control or disposition of property ; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold ; or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned or permitted. Aside from the provisions applicable where congress might exercise municipal power, what the law struck at was *combinations, contracts and conspiracies to monopolize trade and commerce among the several states or with foreign nations ;* but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several states, and that all the companies were engaged in trade or commerce with the several states and with foreign nations ; but this was no more than to say that trade and commerce served manufacture to fulfill its function. Sugar

was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other states, and refined sugar was also forwarded by the companies to other states for sale. Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree. The subject matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed and the suppression of the alleged monopoly in manufacture by the restoration of the *status quo* before the transfers; yet the act of congress only authorized the circuit courts to proceed by way of preventing and restraining violations of the act in respect of contracts, combinations or conspiracies in restraint of interstate or international trade or commerce."

From the definitions of the Congressional power to regulate, stated in *Gibbons vs. Ogden*, and from the fact that we have a dual system of government—power not granted to the United States being reserved to the States—it follows, that the power of Congress extends only to those things that *directly and immediately* pertain to commerce, while the powers of the States cover a large field, including a multitude of things which *indirectly*, though importantly, operate upon commerce (*Gibbons vs. Ogden*, p. 203).

And every case in this Court arising under the statute in question has reaffirmed and insisted upon this line of demarkation between National power and State power.

In the joint traffic case (*United States vs. Joint Traffic Association*, 171 U. S., 505) the Court said:

> "As examples of the kinds of contracts which are rendered illegal by this construction of the act, the learned counsel suggest all organizations of mechanics engaged in the same business for the purpose of limiting the number of persons employed in the business, or of maintaining wages; the formation of a corporation to carry on any particular line of business by those already engaged therein; a contract of partnership or of employment between two persons previously engaged in the same line of business; the appointment by two producers of the same person to sell their goods on commission; the purchase by one wholesale merchant of the product of two producers; the lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop; the withdrawal from business of any farmer, merchant or manufacturer; a sale of the good-will of a business with an agreement not to destroy its value by engaging in similar business; and a covenant in a deed restricting the use of real estate. It is added that the effect of most business contracts or combinations is to restrain trade in some degree.
>
> "This makes quite a formidable list. It will be observed, however, that no contract of the nature above described is now before the court, and there is some embarrassment in assuming to decide herein just how far the act goes in the direction claimed. Nevertheless, we might say that the formation of corporations for business or manu-

facturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade.

"We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of a good-will of a business with an accompanying agreement not to engage in a similar business was instanced in the *Trans-Missouri case* as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business. The instances cited by counsel have in our judgment little or no bearing upon the question under consideration. In *Hopkins v. United States*, decided at this term, *post*, 578, we say that the statute applies only to those contracts whose *direct and immediate effect* is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. *The effect upon interstate commerce must not be indirect or incidental only.* An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does

not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly or remotely affect that commerce. We also repeat what is said in the case above cited, that 'the act of congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it.' To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri case* is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court."

In the case of *Addyston Pipe & Steel Co. vs. United States*, 175 U. S., 211, the Court, on page 228, said that Congress has power to prohibit the performance of those contracts between individuals and corporations, the effect of which is "*to directly, and not as a mere incident to other and innocent purposes*, regulate to any substantial extent interstate commerce." And on page 229 the Court restricts private contracts subject to federal control under the Commerce Clause to those which "*directly* and substantially, and not merely *indirectly, remotely, incidentally and collaterally*, regulate to a greater or less degree commerce among the states." To the same effect are *Hopkins vs. United States*, 171 U. S., 592, and *Anderson vs. United States*, 171 U. S., 615.

The decisions of this Court are conclusive to the point that the interstate commerce power of Congress justifies only such regulations as act upon that com-

merce directly, and does not authorize regulations abridging the police powers of the States or the personal rights and privileges of individuals, if they affect that commerce only "indirectly, remotely, incidentally and collaterally."

It is submitted that the facts, even as found by the Court below, make a stronger case for the application of this principle than was presented in any of the previous litigations in this Court.

In addition to concert of action by several persons in the acquisition of a majority of the shares of two competing interstate railroads—before such acquisition can touch interstate commerce—various conditions must exist or must arise which may never exist or arise at all. Thus—the ordinary principles which govern human conduct being applied—

(a) There must exist or arise in the purchasers of such shares a motive to restrain commerce inspired by the conviction that their immediate pecuniary interests will be thus promoted.

(b) There must exist or arise in such purchasers a purpose to promote those special interests strong enough to overcome their sense of duty as law-abiding citizens, and to obscure their perception of their general interests as citizens.

(c) There must exist or arise an agreement between such purchasers—deemed binding in honor if not in law—by which each shall undertake that his stock shall be used so as to promote the unlawful purpose.

(d) Persons must be found for directors of the two competing interstate railroad companies who can be relied upon to restrain interstate commerce.

(e) Finally, the directors so chosen must actually do what is expected of them, and must violate the law—at the risk of the legal penalties involved—by using their power so as to restrain commerce.

It is plain, therefore, that concert of action in the acquisition of shares of two competing interstate railroads, so far from acting upon interstate commerce *directly*, is separated from such commerce by a variety of circumstances and conditions, the occurrence of any one of which is manifestly uncertain and contingent.

That the power of Congress over commerce does not extend to those things which operate *indirectly* on commerce may be variously illustrated.

That power does not include many things done locally within a State, or by its authority, notwithstanding they may have an influence and effect upon commerce, even to imposing burdens. For example, taxes levied on the property of an interstate carrier are valid, notwithstanding they render transportatien more expensive, and so restrict commerce. The same is true of inspection laws; health laws; laws regulating speed of trains and for the stopping of trains at towns or crossings; laws for the licensing of engineers; and other examples of the exercise of general police and governmental functions of the state. The Court said in *Gibbons vs. Ogden* (pp. 203-4) of such state laws that, while they had a considerable influence on commerce, a power to regulate commerce was not the source from which the right to pass them was derived.

The States make an infinite variety of regulations, all valid notwithstanding they have a bearing or effect upon interstate commerce. By either common law or statute law of the States, railway corporations and other carriers are subjected to all sorts of liabilities for the torts of their officers, agents and servants. Will the proposition be seriously advanced that Congress, under guise of regulating commerce, may enact that railways and other carriers shall not be liable for the torts of their officers or agents? Or suppose a State, by statute, abolishes railway crossings of highways and streets at grade; this would increase the expense of constructing the railways, and would therefore burden interstate commerce, but will it be contended that therefore Congress may overrule such State legislation and make grade crossings permissible?

It must be remembered that individuals and corporations engaged in commerce have other relations to the community. They are citizens of the States first, and as citizens owe certain duties to the States and to the people thereof, from the performance of which, the fact that they are engaged in interstate commerce, cannot absolve them, and for the violation of which their business cannot be an excuse. The busy merchant may find it a serious inconvenience to serve on juries, but no Court would excuse him from this duty because he was engaged in interstate commerce; nor would it be a defense to an indictment for swindling to set up that the goods were imported from another State; the owner of a warehouse may be compelled to put up a fire escape, although the building is used exclusively for interstate goods.

The States, as the protectors of the health, safety and general welfare of their citizens, may regulate the

conduct of all persons and corporations within their borders, and the manner of their using their property so far as may be necessary, and such laws, unless they are regulations of commerce in disguise, are valid, although they affect interstate commerce. And being valid, we know of no power in Congress to declare them void, because the power of Congress is restricted to *providing the rules by which intercourse between States and nations shall be carried on.*

The distinction is nowhere better drawn than in *Sherlock vs. Alling*, 93 U. S., 99. The State of Indiana had enacted a law that whenever a person was killed, under such circumstances that an action could have been maintained had he lived, an action might be brought by his representatives. The death in question was by a steamboat collision on an interstate navigable river. It was urged that as this law created a liability which did not exist, either by common or maritime law, it imposed an unlawful burden on interstate commerce. But the Court, by Mr. Justice FIELD, said that in all those cases where State laws had been held void, because regulations of commerce, the legislation condemned operated *directly* upon commerce. The opinion continues:

> "In the present case no such operation can be ascribed to the statute of Indiana. That statute imposes no tax, prescribes no duty, and in no respect interferes with any regulations for the navigation and use of vessels. It only declares a general principle respecting the liability of all persons within the jurisdiction of the state for torts resulting in the death of parties injured. And in the application of the principle it makes no difference where the injury complained of occurred in the state, whether on land or on water.

General legislation of this kind, prescribing the liabilities or duties of citizens of a state, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. Objection might with equal propriety be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed on the death of the owner, because applicable to the contracts or estates of persons engaged in such commerce. In conferring upon congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affec commerce and persons engaged in it withou constituting a regulation of it, within the meaning of the Constitut on."

"It is true that the commercial power conferr d by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and inter-State commerce, the persons engaged in it, and the instruments by which it is carried on. And legislation has largely dealt, so far as commerce by water is concerned, with the instruments of that commerce. It has embraced the whole subject of navigation, prescribed what shall constitute American vessels, and by whom they shall be navigated, how they shall be registered or enrolled and licensed; to what tonnage, hospital and other dues they shall be subjected; what rules they shall obey in passing each other, and what provisions their owners shall make for the health, safety and comfort of their crews. Since steam has been applied to the propulsion of vessels legislation has embraced an infinite va-

riety of further details to guard against accident and consequent loss of life."

"The power to prescribe these and similar regulations necessarily involves the right to declare the liability which shall follow their infraction. Whatever, therefore, Congress determines, either as to a regulation or the liability for its infringement, is exclusive of State authority. But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the State to which the vessels belong; and it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or inter-State, or in any other pursuit."

The same principle applies to State laws prescribing who may form corporations, and what property corporations may acquire and own, by whom and for what purposes joint associations may be formed, under what conditions real and personal property generally may be bought, held and disposed of. Although all such State laws may operate to a certain extent upon interstate commerce and restrain and burden it, yet none of them are regulations of commerce, or come within the power of Congress under the constitution. They have always been regarded as valid, notwithstanding they

ultimately and indirectly operate upon interstate commerce, and notwithstanding a holding of property within a State may put it into the *power* of someone to monopolize, or restrict competition in interstate commerce.

If power is actually used to make unreasonable interstate rates, or to regulate the prices of goods sold into other States, or otherwise to actually restrict or burden interstate commerce, such *use* of power or property and such *actual* restraint on commerce are contrary to the Federal law; but a case is not brought within the jurisdiction of Congress over commerce, simply because a corporation or individual may have *power* or influence over interstate rates, or because it or he *may* exercise an influence to reduce competition in trade among States. The question in this case is not what may be obnoxious to the common law, or to any regulations States have imposed, or may impose, but concerns only what is prohibited by the Constitution of the United States and the law of Congress. In order to bring a case within the Constitution and the law of Congress, the thing sought to be restrained must be an *actual* and *direct* restraint of commerce.

The case of *Louisville & Nashville Railroad Company vs. Kentucky*, 161 U. S., 677, 701, seems to us controlling. It was argued in that case that the State of Kentucky had no right to forbid the consolidation of competing interstate railways, because that was a subject pertaining to commerce and therefore subject to the jurisdiction of Congress under its power to regulate commerce. But the Court said (p. 702–3):

> "It has never been supposed that the dominant power of Congress over interstate commerce took

from the states the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers. Nearly all the railways in the country have been constructed under state authority, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the states remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests.

"If it be assumed that the states have no right to forbid the consolidation of competing lines, because the whole subject is within the control of congress, it would necessarily follow that congress would have the power to authorize such a consolidation in defiance of state legislation—a proposition which only needs to be stated to demonstrate its unsoundness."

The Court cites a number of decisions in which State statutes prohibiting or permitting consolidations had been enforced. They were obviously enforced erroneously, and the *Louisville and Nashville Case*, as well as the *Pearsall Case*, were erroneously decided if the things complained of fall within the power of Congress over commerce, *for that power, if it exists, is exclusive of all State action.*

If to regulate the consolidation of interstate railways chartered by the States and the qualifications of

their stockholders belong to the Commerce power of Congress, that power is capable from the nature of the subject to uniform regulation only. In its very nature the subject would be one not susceptible of treatment by Congress in the way of diverse local regulation. It would be impossible for Congress to authorize a consolidation of the appellant's railways in Wisconsin and to forbid it in Minnesota. It would be impossible to allow a joint holding of stock as to that part of the lines in a particular State only. Therefore, if the subject belongs to the Commerce power, it could be dealt with only by uniform regulation.

It is only as to matters capable of local regulation, like pilotage (*Cooley vs. Board of Port Wardens*, 12 How., 299) lights to be displayed by ships in harbor (*The James Gray vs. The John Fraser*, 21 How., 184) and dams of rivers wholly within a State (*Pound vs. Turck*, 95 U. S., 459) that the States may make certain local commercial regulations until Congress has acted.

The rule first definitely formulated in *Cooley vs. Board of Port Wardens*, was thus stated by Mr. Justice CURTIS in that case:

> "Whatever subjects of this power are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

Mr. Justice BRADLEY thus stated the doctrine in *Robbins vs. Shelby Taxing District*, 120 U. S., 492:

> "The constitution of the United States having given to congress power to regulate commerce, not only with foreign nations, but among the several

> states, that power is necessarily exclusive wherever the subjects are national in their character, or admit only of one uniform system or plan of regulation. * * * Another established doctrine of this court is, that where the power of congress to regulate is exclusive, the failure of congress to make express regulation indicates its will that the subject shall be left free from any restrictions or impositions, and any regulation of the subject by the states, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom."

The same rule was laid down in *County of Mobile vs. Kimball*, 102 U. S., 691; *United States vs. E. C. Knight Company*, 156 U. S., pp. 11, 12; *Addyston Pipe & Steel Company vs. United States*, 175 U. S., 230.

Therefore, if the decision of the Circuit Court is correct, all the State laws either forbidding or authorizing consolidations of interstate carriers are and always have been void. And this is as true in case of connecting and other non-competitive carriers as in case of competing carriers; every consolidation, every sale, every lease between interstate carriers, every holding of stock by one in another has been always illegal, though authorized by State laws, and whether accomplished before the passage of the act in question or since. There is no escape from this conclusion, if regulation of these matters forms part of the commercial power of Congress; for if the power of Congress covers the subject, it is, whether exercised or not, exclusive and prohibitive of State action.

III.

Except as it punishes contracts, combinations and conspiracies, the statute introduces no new rule of law. That is, whatever is a restraint of commerce now, was such before this statute. The act is new only in making the preliminary conspiracy a crime.

It was settled *In re Debs*, 158 U. S., 564, that the Constitution itself forbade all restraints of interstate commerce, whether by individuals or states. That was the very point of decision.

It was argued that the power of Congress was limited to preventing the states from imposing restraints on commerce, but the Court said (p. 581), by Mr. Justice BREWER:

> "If a state with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that state has a power which the state itself does not possess?"

The Court held that the power of the United States over interstate commerce was that of direct supervision, control and management, and was not limited to prevention of restraints imposed by state law; and that any restraint upon the free transaction of interstate commerce imposed by individuals, or associations, was as obnoxious to the control of commerce granted by the Constitution to Congress, as any state action could be. This doctrine was laid down without any reference to, or reliance upon, the Trust Act of 1890; see concluding paragraph of the opinion.

The doctrine was reaffirmed in the *Addyston Pipe Case* (p. 230) and followed logically from the principles laid down in *Gibbons vs. Ogden.*

It certainly cannot be disputed that any restraint of interstate commerce offends the power to regulate vested in Congress when accomplished by subtle and peaceful means as in the *Addyston Pipe Case* the same as when accomplished by threats and violence as in the *Debs Case.*

Therefore, if it be true that a consolidation of competing carriers to-day, or a common holding of their stock, is really a restraint of interstate commerce, it was equally so *before the Anti-trust Act* and from the beginning.

If a contract, arrangement or combination does restrain interstate trade, it is immaterial whether it has the sanction of State law or not. A State law would be contrary to the *power* vested in Congress. In the case at bar, or in any similar case, the transaction, if it in truth restrains commerce, could not be sustained though fully authorized by State law.

For a holding company to own the stock of competing interstate carriers is plainly *no more* prohibited by the act than for one interstate carrier to purchase, lease, or otherwise control the property of a parallel or competing carrier.

Railways have been bought, or leased, or controlled through stock ownership, by railway corporations owning parallel lines, the country over. So, the country over, have individuals, partnerships and corporations held stock in competing railway companies. These things have been done commonly, openly and notoriously during the past fifty years, both before and since the Act of 1890. Largely this has been done under the ex-

press sanction of State law; but whether so or not is immaterial. If these things are restraints on interstate commerce, they are and always have been invalid. We have pointed out that they were as invalid before the act as since, because contrary to the settled doctrine that, even in the absence of legislation by Congress, neither States nor individuals can restrain, or impose burdens upon interstate commerce.

No more serious or far-reaching question could be put, than whether such transactions are really the subject of State regulation, or whether they are restraints upon interstate commerce, and consequently within the exclusive power of Congress under the Constitution.

Parallel telegraph lines have been built and have been acquired by purchase, or otherwise controlled, so that to-day practically all the telegraphs of the country belong to two corporations. Have all such acquisitions of property been invalid because restraints upon interstate commerce?

If the owner of a steamboat, or of a stage line running between states, buys up, or leases, or acquires stock in, or consolidates with a competing steamboat or stage line, is that a restraint upon interstate commerce? If so, a State law cannot legalize it.

The same question may be put in innumerable forms. Is it a restraint of interstate commerce for a merchant or manufacturer, engaged in selling goods and shipping them to other States, to buy out or go into partnership with, another engaged in the same business? This Court said it was not in the case of the *Joint Traffic Association.*

If two or more individuals, owning stock in competing mercantile or carrying corporations engaged in

interstate traffic, unite in a co-partnership, turning in their stock as partnership assets, is that a restraint of interstate commerce? And is such a partnership, though authorized by State law, void as contrary to Federal law?

If the same individuals, instead of forming a co-partnership, form a corporation sanctioned by State law, is their doing so, or the corporation buying stock of them, obnoxious to the law of Congress and is it a subject of Federal control?

Suppose I combine with my neighbor to buy a piece of real property; is that contrary to the Federal law because our intention is to manufacture, ship, or receive upon that property goods in the transaction of a business, which aims to monopolize, or restrain interstate commerce? Is the mere right in such cases to take title to the real estate a subject of Federal control, or of State control, and is not Federal control limited to prevention of the *actual use of the property* to restrain interstate commerce?

The acts stated in all the supposed cases may have a tendency to reduce competition in interstate commerce, or to facilitate and make more easy restraints upon that commerce, but the acts themselves are not commerce and their effect upon and connection with commerce is indirect and remote.

If the Act of 1890 and the power of Congress over commerce are to be pressed to the extent of making such transactions void, Congress is by one stroke invested with the regulation of a large portion of those affairs hitherto supposed to belong exclusively to the States. It would place in Congress the general right to regulate who may and who may not buy, hold and sell real estate and personal property, including stocks

and other securities, within the several States; with the regulation of the law of partnership and of corporations, even although such partnerships and such corporations are not engaged in any kind of commerce.

IV.

If a thing restrains interstate commerce, it is immaterial with what innocent intent it may be done. On the other hand, if the thing complained of does not restrain interstate commerce, it is immaterial how evil may be the intent. As the Court said in *United States vs. Freight Association*, 166 U. S., 290, 341, the question is, does the agreement restrain trade or commerce in any way.

If an action be lawful, it is elementary that its purpose is immaterial; *Addyston Pipe & Steel Co. vs. United States*, 175 U. S., 211, p. 234, where the Court said:

> "If the necessary, direct and immediate effect of the contract be to violate an act of congress and also to restrain and regulate interstate commerce, it is manifestly immaterial whether the design to so regulate was or was not in existence when the contract was entered into. In such case the design does not constitute the material thing. The fact of a direct and substantial regulation is the important part of the contract, and that regulation existing, it is unimportant that it was not designed.
>
> "Where the contract affects interstate commerce only incidentally and not directly, the fact that it was not designed or intended to

affect such commerce is simply an additional reason for holding the contract valid and not touched by the act of congress. Otherwise the design prompting the execution of a contract pertaining to and directly affecting, and more or less regulating, interstate commerce is of no importance."

The following decisions support this conclusion:

"Bad motives in doing an act which violates no legal right of another cannot make that act a ground of action" (*Phelps vs. Nowlen*, 72 N. Y., 39, 45).

"The exercise of a legal right cannot be affected by the motive which controls it" (*Kiff vs. Youmans*, 86 N. Y., 324, 329).

An act which is not in and of itself a fraud, is not made so by alleging that it was induced by a desire to deceive and defraud the plaintiff (*Wood vs. Amory*, 105 N. Y., 278, 281).

"The purpose of an act which in itself is perfectly lawful or, under all the circumstances, reasonable, is seldom, if ever, material" (*Lough vs. Outerbridge*, 143 N. Y., 271, 282).

"An act legal in itself, and violating no right, cannot be made actionable on account of the motive which superinduced it" (*Adler vs. Fenton*, 24 How., 407, 410).

It is not sufficient to charge an unlawful intent, or to aver that a combination or a course of business is in restraint of trade, or a monopoly of trade, in order to constitute a crime. Acts relied upon to make the offense must be stated (*U. S. vs. Greenhut*, 51 Fed., 205, 211; the same thing is held *In re Greene*, 52 Fed., 104, 111, 112).

"No action can be maintained against one on account of the exercise of a legal right, whatever the motive that dictated such exercise" (*Randall vs. Hazleton*, 12 Allen, 412, 418).

To the same effect are *Brackett vs. Griswold*, 112 N. Y., 454; *U. S. vs. Isham*, 17 Wall., 496; *Dickerman vs. Northern Trust Co.*, 176 U. S., 181; *Fahrney vs. Kelly*, 102 Fed., 403; *Mogul Steamship Co. vs. McGregor*, App. Cas., 1892, pages 25, 41; *Allen vs. Flood*, L. R. App. Cas., 1898, p. 1.

Stress is laid upon the Securities Company being organized for the purpose and with the intent of acquiring the stock of the two railway companies. The authorities we have cited show that this intent, if conceded, is utterly immaterial. If the buying and voting the stock restrains interstate commerce, it is illegal. If it does not restrain interstate commerce, it is legal; and the conspiracy behind the formation of the company was a conspiracy to do a lawful thing; *Bohn Mfg. Co. vs. Hollis*, 54 Minn., 223, 234.

The intention to buy these stocks existing before the formation of the Securities Company, and the formation of the company for the purpose of buying these stocks do not make this case differ in the slightest from one, where a partnership or a corporation already organized primarily for other purposes should resolve on buying the same stocks. For, in the case of a partnership, or corporation primarily organized for other purposes, the conspiracy and combination to buy the stocks would have to exist before the stocks were bought. And such a combination to buy stock of competing railway companies is exactly as vicious and exactly as innocent, as a combination to form a corporation and have the corporation buy the same stock.

V.

The opinion of the Court below proceeds upon the proposition that a combination of two competitors is a *restraint of trade*, because it *lessens or tends to lessen competition.*

But the act says nothing about *competition.* It forbids combinations in *restraint of trade.* In order to bring the case within the act, it must be shown that, when competition is lessened by consolidation of two companies, or by their stock being acquired by one interest, a combination is formed in *restraint of commerce*, but the opinion below makes no attempt to prove this by any course of reasoning or reference to authorities.

The decisions of this Court in the *Trans-Missouri Freight Case*, the *Joint Traffic Case* and the *Addyston Pipe Case* are cited, but they prove only that a contract expressly and directly restraining the right of rival companies to compete is a restraint of trade. But here there is no agreement of any kind, certainly no agreement restraining or restricting the right or ability of either carrier to compete. The cases cited contain no intimation that a single person or corporation, or two or more persons jointly, may not own interests in rival carriers and exercise such rights as result from their ownership. This case is not, therefore, within those decisions.

The opinion below assumes that a contract or combination *restrains commerce* whenever it destroys or lessens the *motive for competition.* But a partnership does that; so does the organization of a corporation where its stock is held by more than one. But the

Court said in the *Joint Traffic Case* (171 U. S., 567): "The formation of *corporations* for business or manufacturing purposes has never to our knowledge been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of *partnership*." In the *Addyston Pipe Case*, 54 U. S. App., 744, TAFT, J., says: "Again, when two men become *partners* in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise and energy to carry on a successful business and one useful to the community." A combination may, therefore, *destroy competition* without *restraining trade.*

As was said by Mr. Justice PECKHAM in the case of *Trans-Missouri Freight Association*, 166 U. S., 328: "Contracts in restraint of trade have been known and spoken of for hundreds of years both in England and in this country." A clear and complete statement of the law regarding such contracts and its development is given by Judge TAFT in the *Addyston Pipe Company case*, 54 U. S. App., 741. It appears from the cases there collected that from early times various contracts by which parties undertook to restrain themselves in regard to their trade or business have been held by the Courts non-enforceable, although not otherwise illegal and not criminal. The policy of the law was to encourage trade, and the objection to these restraints was that, by excluding the persons making such contracts from the exercise of their trades, enterprise and industry were discouraged, competition prevented, and the public exposed to the evils of monopoly. Exceptions to the rule were gradually introduced, the principal one being that, when one sold his business, he

might lawfully restrain himself to a reasonable extent from carrying on a similar business, so as to compete with the purchaser. Such limited restraints were regarded as incident to the main purposes of the transaction, which was promotive of trade.

But among all the cases there is none in which it has been intimated that a contract restrains trade when competition is ended or lessened by the association in a common enterprise of two or more persons previously competitors, or when one, or two, or more jointly acquire such a controlling interest in competing enterprises that there is no longer a motive for competition between them. In the case of a partnership, although competition between the members is checked the exertions of all are employed for a common object, and trade on the whole is thereby promoted. The same is more clearly the case where one or more persons acquire a controlling interest in two competing corporations, for in that case every person interested in the corporations may compete with them; and each corporation may compete with the other.

The action of every corporation is directed, to a certain extent, by its own interest. When the stockholders of a corporation exercise their power against a certain course of competition with a rival they do not thereby restrain trade; they only direct the business of the corporation as a single trader would direct his own business. The exercise of this power does not become a restraint of trade, because their action is affected by a pecuniary interest which they may have in a rival. Indeed it is not necessary to destroy the motive for competition that the *majority* holder of shares in one corporation should also own a *majority* in a competing corporation. The ownership of any

substantial number of shares in both would be sufficient for that purpose and, therefore, to sustain the reasoning of the Court below it must be held unlawful for a single person, partnership or corporation to acquire *any* interest in two competing enterprises engaged in interstate commerce.

The law does not require that persons or corporations shall compete or conduct their business in opposition to one another, and it does not forbid the acquisition of such interests in different enterprises as lessens the motive for competition. All that it requires is that corporations and individuals competing in interstate commerce shall not restrain themselves from competing, but shall remain free to act as their interests shall dictate.

The business of a rival in trade may be purchased for the very purpose of being rid of his competition.

> *Gamble vs. Queens Co. Water Company*, 123 N. Y., 91, 104; *Diamond Match Co. vs. Roeber*, 106 N. Y., 473; *Rafferty vs. Buffalo City Gas Co.*, 37 N. Y. App. Div., 618, 621; *Trenton Potteries Co. vs. Oliphant*, 56 N. J. Eq., 680; *Oakdale Co. vs. Garst*, 18 R. I., 484.

In such a purchase there is nothing that has ever been understood as a restraint of trade or commerce. Indeed, it appears that during the discussion of the act in question by Congress an amendment was proposed that prohibited any contract for the purpose of *preventing competition* in the transportation of persons or property, and this amendment was rejected (166 U. S., p. 317). Nobody appears to have been bold enough to propose an amendment forbidding the purchase of such interests in different enterprises as would take away

the motive for competition or give the persons acquiring such interests the power to stop it.

The case is summed up by the Circuit Court in the sentence: "Competition, we think, would not be more effectually restrained * * * if the two railroad companies were consolidated under a single charter." But there is no reason for doubting that the two companies might have been consolidated without any violation of the Sherman Act. Consolidation in many similar cases has taken place under the authority of State laws, and it has never been doubted, we believe, that consolidations so authorized are valid. And yet in that case all competition would be absolutely destroyed. It is impossible, therefore, to maintain that the destruction of competition or the motive for competition, is equivalent to a restraint of commerce, for if that were so, as we have previously shown, every State law authorizing consolidation of competing enterprises engaged in interstate commerce must be held to have been a restraint of interstate commerce and void.

VI.

The question being whether there was any violation of the Anti-trust Act of 1890, it is to be noted that the Securities Company is neither alleged nor proved to have done or omitted anything which can be construed as such violation. If it has had the power to suppress or diminish competition between the Great Northern and Northern Pacific Companies, it has not used it. Hence, if the act has

been violated at all, the violation must be due to one of three things; to the mere existence of the Securities Company as a corporation, to its powers as applicable to Great Northern and Northern Pacific shares, or to something illegal in its origin and organization.

1. But the existence of the Securities Company as a legal person is, on the theory of the Court below quite immaterial, and is a fiction of which, in the interest of substantial justice, no account is to be taken.

In the view of the Circuit Court the company is simply a medium—an agency—through which the natural persons creating or represented by it act—to which they stand in effect in the relation of principals—and which in no way relieves them of responsibility for its acts.

To quote the language of the Court, the Securities Company is nothing but "a few men acting in concert in its name and under cover of its charter." So that in considering the decree of the Circuit Court the Securities Company may be dismissed from consideration unless it can be shown that the powers given or sought to be given it can not be exercised through any agent, or, if through any, not through such an agent as the Securities Company.

2. But it cannot be maintained—it is not indeed suggested—that the powers over the Great Northern and Northern Pacific shares conferred upon the Securities Company by the natural persons of which it is the organ must be exercised by them personally and not through an agent, or that the Securities Company for any reason lacks the corporate capacity to act as agent for the exercise of those powers.

There is indeed nothing peculiar or extraordinary in those powers. They are the same—no more or no less

—possessed by the owners of the shares before their sale to the Securities Company. Before such sale those owners were majority stockholders in both the Great Northern and Northern Pacific Companies, and thus could elect the directors and to that extent indirectly control the affairs and operations of both companies. The Securities Company now has exactly the same powers, and in accordance with the doctrine of the Court below is really the same "few men acting in concert in its name and under cover of its charter."

The powers of the Securities Company being those of "the few men acting in concert"—those powers being legally capable of delegation to the Securities Company and of performance by that company—and no violation of the Anti-trust Act by the "few men acting in concert" through the exercise of those powers by the Securities Company being even claimed—*the mere possession of those powers by the Securities Company—i. e., by "the few men acting in concert"*—is the thing upon which the Government must rely to establish a breach of the Anti-trust Act. That is, indeed, the precise position of the Court below, which rules that, if the power to suppress competition between competing interstate railroad companies is acquired and possessed by "a few men acting in concert," there is a necessary violation of the Anti-trust Act, and which holds that in its ruling it simply follows and applies a doctrine already affirmed by this Court. But—

(a) The cases cited by the Court below on this point do not sustain its contention. In each of them, persons or corporations, beside possessing the power to suppress competition, had actually used it by enter-

ing into agreements actually accomplishing that precise result.

(b) The mere power to stifle competition between interstate railroad companies acquired and possessed as one of the incidents of the general control of a corporation by stockholders is not made illegal by the Anti-trust Act. No such operation can be given to the act either as the result of the terms employed or by necessary or reasonable implication from those terms.

If the purpose of the statute were to do away with all *power to suppress competition* on the part of such stockholders, there would be found in it appropriate language to that effect.

It would prohibit a single stockholder from buying a majority of the stock of two such competing companies, or, if he had bought a majority of the stock of one of them, would incapacitate him from taking by inheritance or otherwise, or from continuing to hold, a majority of the stock of the other.

It would either prohibit a majority of the stocks of two competing interstate railroad companies from passing by inheritance to an heir or heirs or from being taken for debt by a creditor or creditors, or it would in each case compel a sale by the party or parties interested of his or their shares in one or the other of such companies.

In short, if the statute had meant to strike at all power on the part of stockholders of two competing interstate railroad companies to suppress competition between them, it would have enacted in express terms that neither one person nor several persons should own a majority of the stocks of both such companies.

And it would have said that such railways could not consolidate and that one could not be controlled by another.

But the statute contains not a word or a syllable which looks in that direction or which can be tortured as contemplating or effecting any limitation upon the right to acquire and hold property.

It is the use—not the acquisition or ownership—of property which the statute forbids, and the forbidden use must be (1) in restraint of trade, and (2) the result of a contract, combination, or conspiracy.

Hence, no violation of the Anti-trust Act can be held to result from the simple ownership by the Securities Company of a majority of the stocks of the Great Northern and Northern Pacific Companies—from the mere fact that the Securities Company, or the "few men acting in concert" of whom it is said to be the organ have the power—in the exercise of the general control vested in a majority in interest of the stockholders of both those companies to suppress competition between them.

3. For the purposes of the present suit the existence of the Securities Company being unimportant, the mere power to violate the Anti-trust Act possessed either by the Securities Company in its capacity of stockholder or by the natural persons holding its stock not of itself constituting such violation, the further question is whether there is anything in the mode of acquisition of that power which makes its possession unlawful under the Anti-trust Act. The Court below rules that there is, and that that thing is the *concert of action* in the procurement of the power between the men creating the Securities Company as their organ and representative.

That is, in the view of the Court below, though a single individual as a majority stockholder in two competing interstate railroad companies may lawfully possess the power to violate the Anti-trust Act, though several individuals as such majority stockholders may lawfully possess the same power through accident, through operation of law, or in any way not involving their mutual co-operation to that end, yet, if several individuals get the same power by concert of action, its possession falls within the interdictions of the Anti-trust Act and forthwith becomes unlawful.

If it be asked how such a concert of action can work such a result, the answer is—in the view of the Court below—that the "concert" is conclusive proof of unlawful intention. Realizing that the mere possession of power to violate the Anti-trust Act cannot of itself be a violation, but must be accompanied by an intent to use it for that purpose, the Court below holds that concert of action in acquiring the power supplies such intent. It is held to do so as matter of law, and because, according to the Court below, the power being obtained, every motive for competition is destroyed and every man is presumed to intend the necessary consequences of his acts.

These propositions, it is submitted, as applied to the case at bar, are unsound alike in law and in reason.

First. The acquisition or possession of power to do an illegal act cannot be held as matter of law to extinguish all motive to refrain from such act.

No such doctrine has ever been laid down, either by Courts or by jurists.

It ignores the consideration that, as the true interest of every member of the community is that the

law should be universally respected, he has always a strong motive to be himself law abiding.

Any such doctrine is not only without warrant in our jurisprudence, but is in direct antagonism to one of its most salutary and best-established tenets.

Nothing in our law is better settled or deemed more vital than the principle that every man is charged with knowledge of the law and credited with the desire and the purpose to obey it—whence the presumption of innocence until guilt is proven.

But such a presumption would manifestly be a mere form of words—devoid of all substantial value—if the mere acquisition or possession of a power to break the law were held to remove all motive to obey it and to justify a presumption of intent to disobey it.

SECOND. Equally untenable is the proposition that, if several persons by concert of action become majority stockholders in each of two competing interstate railroads and thus acquire the power to destroy competition between them, the legal consequence of such concert is to convict them of an intent to destroy such competition and thus to violate the Anti-trust Act.

(a) It is conceivable that several persons might co-operate in buying of the owners not a majority of the stock of each of two competing interstate railroads but only the right, at their option, to vote such majority at corporate meetings so as to do away with competition.

It might then be urged with great force that such a special power must have been obtained for use and with the intent to use it, and a court or jury might so find as matter of fact. Even in that case, however, there would be no legal presumption to that effect.

(b) The case at bar, however, presents no such situation. Nothing appearing except that several persons have by concert of action acquired a majority of the stocks of two competing interstate railroads, not only is an illegal intent to violate the Anti-trust Act not a necessary and therefore not a legal consequence of the "concert," but the parties concerned are entitled to the presumption of their "concert" being for entirely lawful and laudable purposes.

Thus the parties concerned may have looked into the market value and earning capacity of the stocks in question and may have arranged to acquire a majority interest in them solely because of their intrinsic financial merits.

Their concerted action may have had no other object than to determine how and when and through what agency or agencies each should buy—that they might not uselessly bid against each other and raise market prices beyond their normal or fair value.

Their concerted action may have been based on the natural and proper view that the railroad properties in question were desirable investments only if the ultimate control of the properties was secured to themselves as investors and thus placed beyond the reach of mere speculators.

Their concerted action may have been based on the conviction that the stocks in question would be good investments only if desirable changes in the management of the properties could be brought about through the assured control of a majority ownership.

Their concerted action, indeed, may have been prompted by nothing else than threatened or apprehended violations of the Anti-trust Act on the part of those then in control of the properties, and may have

had as its precise object the prevention of such violations and the rescue of the properties from the injurious consequences of such violations.

Or their concerted action may have been for the purpose of preventing the control of either railway from passing to people mainly interested in the development of other sections of the country and lines of traffic other than those wherein they conceived their true interests to lie.

In short, to declare that an intent to violate the Anti-trust Act follows as a necessary consequence from the concerted action of several persons in becoming majority stockholders of two competing interstate railroads is to state a proposition repugnant to common sense and common experience and without foundation in reason or in fact.

As matter of law, such a proposition directly conflicts with that legal presumption of lawful purpose and intent which attaches to every act not either *malum in se* or *malum prohibitum*.

If the rule laid down by the Court below be sound there is no possible reason for limiting its application to the Anti-trust Act and to the case of several persons by concert of action acquiring a majority of the stock of two competing interstate railroads.

On the same theory and for the same reason, if several persons by concert of action acquire a majority of the stock of one interstate railroad, those persons, as they have the power, are to be charged with the intent to violate the Interstate Commerce Law respecting discriminations between customers, to disobey the statute respecting couplers of cars and other safety appliances, and to break any law that Congress may have

enacted under its general power to regulate commerce, including the act in question.

The power itself to do interstate business necessarily involves the power to restrain it. Any railway company or corporation or person engaged in commerce has *power* to restrain it. The power to do involves the power to restrain. If the doctrine of the Court below is correct, every combination of capital and brains to engage in and expand commerce must therefore be condemned as criminal and illegal.

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